Neutral citation [2022] CAT 41

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1291/5/7/18 (T)

20 September 2022

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Before:

HODGE MALEK KC
(Chair)

BETWEEN:

(1) RYDER LIMITED
(2) HILL HIRE LIMITED

Claimants

- and -

~~(1) MAN SE~~
~~(2) MAN TRUCK & BUS AG~~
~~(3) MAN TRUCK & BUS DEUTSCHLAND GMBH~~
~~(4) MAN TRUCK AND BUS UK LIMITED~~
(5) AB VOLVO (PUBL)
(6) VOLVO LASTVAGNAR AB
(7) VOLVO GROUP TRUCKS CENTRAL EUROPE GMBH
(8) VOLVO GROUP UK LIMITED
(9) RENAULT TRUCKS SAS
(10) DAIMLER AG
(11) MERCEDES BENZ CARS UK LIMITED
(12) STELLANTIS N.V. (FORMERLY KNOWN AS FIAT CHRYSLER AUTOMOBILES N.V.)
(13) CNH INDUSTRIAL N.V.
(14) IVECO S.P.A.
(15) IVECO MAGIRUS AG
(16) IVECO LIMITED
(17) PACCAR INC.
(18) DAF TRUCKS N.V.
(19) DAF TRUCKS DEUTSCHLAND GMBH
(20) DAF TRUCKS LIMITED

Defendants

Heard remotely on 20 September 2022

RULING: DISCLOSURE

APPEARANCES

Mr Josh Holmes KC and Ms Antonia Fitzpatrick (instructed by Ashurst LLP) appeared on behalf of the Ryder Claimants.

Mr Michael Armitage and Ms Alexandra Littlewood (instructed by Macfarlanes LLP) appeared on behalf of the Daimler Defendants.

Ms Sarah Abram KC and Mr Harry Gillow (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of the Volvo/Renault Defendants.

A. INTRODUCTION

1. By its decision in *Trucks*, adopted on 19 July 2016 ("the Decision") the European Commission ("the Commission") found that five major European truck manufacturing groups had carried out a single continuous infringement of Article 101 of the Treaty on the Functioning of the European Union with respect to the sale of medium and heavy trucks ("Trucks") over a period of some 14 years between 1997 and 2011 ("the Infringement").

2. Another major truck manufacturing group, Scania, did not participate in the settlement and was the subject of a separate Commission decision on 27 September 2017, finding that it was a participant in the Infringement and imposing a fine of €880 million. Scania's appeal against that decision was recently dismissed by the General Court, Case T-799/17, *Scania v Commission* EU:T:2022:48, but Scania is appealing further to the Court of Justice of the European Union.

3. Seven actions claiming damages against the addressees of the Decision and related companies have been transferred from the High Court to the Tribunal and these have been treated by the Tribunal as the first wave of proceedings (the "First Wave Proceedings"). For the purposes of this ruling, the addressees of the Decision and defendants to these actions may be referred to simply by the corporate name of the group to which they belong, DAF, Daimler, Iveco and Volvo/Renault ("the VT/RT Defendants"), and together they are referred to as the "OEMs", the original equipment manufacturers.

4. Six case management conferences in these proceedings ("CMCs") have taken place in the Tribunal, on 21 to 22 November 2018, 2 to 3 May 2019, 6 February 2020, 29 to 30 October 2020, 5-6 May 2021 and 11-12 October 2021.

5. Disclosure has featured heavily in each of the CMCs and this aspect is being closely managed by both the parties and the Tribunal given the complexities, importance and costs of the exercise.

6. The seven actions in the First Wave Proceedings have been split into three for the purposes of trial. The first group is Royal Mail and BT. These proceedings

concern the sale of trucks in the UK and only against one OEM, which is DAF. This was tried from 3 May 2022 to 30 June 2022. Judgment has been reserved.

7. The second group are the Ryder and Dawsongroup proceedings, which concern the sale of trucks in the UK, and against multiple OEMs[1]. These are due to be tried starting on 13 March 2023. The present application relates to these proceedings.

8. The third set of proceedings are the Veolia, Suez and Wolseley proceedings (the "VSW proceedings"), each of which involve numerous claimants and concern the sale of trucks in the UK and Europe, including for current purposes France and Germany. The Suez proceedings are brought by 339 claimants against DAF and Fiat, who brought in the other OEMs, including Daimler and Scania, as third parties. The Veolia proceedings are brought by 139 claimants against all five OEMs, who are the subject of the Decision, who in turn had brought third party proceedings against Scania. The Wolseley proceedings are brought by 154 claimants against DAF and Fiat, who had brought in the other OEMs, including Scania, as third parties. The VSW proceedings are due to be tried starting on 9 April 2024. These are not the only truck actions before the Tribunal. Further waves of claims have been brought, but in the main these are all at a relatively early stage.D.

B. APPLICATION

9. By an application letter dated 26 July 2022 from Ashurst on behalf of the Ryder Claimants ("Ryder"), Ryder seeks disclosure from the Daimler and VT/RT Defendants in relation to the pricing of ancillary products and services ("the Application"). The Application initially included the Iveco Defendants, but the proceedings against Iveco have been stayed pursuant to an order dated 23 August 2022. The form of order sought is appended to the Application, paragraph 1 of which sets out the documents sought (amended here to reflect the removal of Iveco):

[1] By an order of the Chairman dated 14 February, the claims against the MAN Defendants in Case 1291/5/7/18(T) were dismissed by consent.

"The Volvo/Renault and Daimler Defendants shall by [•] 2022 disclose to the Claimants the documents which are part of the Commission's administrative file relating to its investigation in Case AT/39824 which were previously withheld from disclosure:

(a) pursuant to paragraph 1(1) of the Excluded Categories of Disclosure Order made by Rose J on 18 December 2017 in Claim No. HC-2016-003443; and

(b) under category P "*documents relating to the market for and pricing of spare parts*" as set out in Schedule 1 of the Iveco Defendants' disclosure statement dated 21 September 2018 and paragraph 18 of Annex 1 to the DAF Defendants' disclosure statement dated 21 September 2018."

10. In essence Ryder seeks disclosure of two categories of documents that may be included in the administrative file of the Commission underlying the Decision. There has already been extensive disclosure of documents from the file by the Defendants in these proceedings, however this was subject to the exclusion of documents that were considered irrelevant at the time of the initial disclosure. The focus then was in relation to the Infringement relating to the Trucks, rather than the products and services that may have been sold alongside the Trucks. The two categories of documents now sought include:

(1) those that relate solely to products and services other than Trucks; and

(2) those that relate to the market for and pricing of spare parts.

11. Upon receipt of the application, the Tribunal determined that it was suitable to be dealt with by way of a Friday application to be decided by me by way of a short hearing with evidence limited in length. The matter was subsequently listed to be heard on 20 September 2022 with a time estimate of half a day. The aim is to deal with such applications in a cost-effective way in accordance with the Tribunal's governing principles set out in Rule 4 of the Competition Appeal Tribunal Rules 2015.

12. The Application is supported by the seventh witness statement of Dr Lawrence Wu of NERA Economic Consulting dated 26 July 2022 ("Wu 7"). Dr Wu and his firm are the economic advisors of Ryder, and Dr Wu has been appointed as an independent economic expert to provide evidence in these proceedings in the field of regulatory and competition economics, including on volume/value of

commerce and overcharge. The Overcharge is the amount paid for the Trucks over and above the prices that would have been paid absent the Infringement.

13. Paragraphs 18 to 20 of the Directions Order made at the Case Management Conference on 11 and 12 October 2021 ("the Directions Order") provide that the experts (Mr Biro, Dr Nitsche and Dr Coppi) are required to consider:

    (1) Volume/Value of Commerce "*with Value of Commerce to be calculated both with the discounts applied pursuant to* [Volvo/Renault's Total Value Plea and Daimler's Bundled Discounts Plea] *and without those discounts applied*"; and

    (2) Overcharge "*(to be calculated both on the basis of the value of commerce with any discounts pursuant to* [Volvo/Renault's Total Value Plea and Daimler's Bundled Discounts Plea] *applied and on the basis of the value of commerce without any such discounts applied*)".

14. Dr Wu will no doubt be responding to the expert evidence filed on behalf of the Defendants' experts on those issues. The current deadline for Dr Wu's reply evidence is 9 December 2022.

15. The Application is also supported by the thirteenth witness statement of Mr Euan Burrows of Ashurst LLP ("Burrows 13"), solicitors for Ryder. The Application is opposed by Daimler and the VT/RT Defendants, who have filed evidence of their own in the form of the following statements dated 9 September 2022:

    (1) the first witness statement of Mr Daniel Lavender of Macfarlanes LLP ("Lavender 1"), solicitors for the Daimler Defendants (the 10th and 11th Defendants, Daimler AG and Mercedes-Benz Cars UK Ltd);

    (2) the seventh witness statement of Mr Nicholas Frey of Freshfields Bruckhaus Deringer LLP ("Frey 7"), solicitors for the VT/RT Defendants (5th to 9th Defendants, AB Volvo (publ), Volvo Lastvagnar AB, Volvo Group Central Europe GmbH and Volvo Group Ltd); and

(3) the seventh witness statement of Mr Zoltan Biro of Frontier Economics Ltd ("Biro 7"). Mr Biro and his firm are the economic advisors of the VT/RT Defendants.

16. The parties filed skeleton arguments on 16 September 2022. The bundle of the key materials for the Application are contained within a single file, which is proportionate for a half day hearing.

C. BACKGROUND

(1) Approach to disclosure in the Trucks actions

17. This application for disclosure is being made pursuant to paragraphs [50] to [53] of the Tribunal's ruling on disclosure made on 15 January 2020 ([2020] CAT 3) ("the Disclosure Ruling").

> "50. To address any concerns the parties may have that there is insufficient time at a disclosure hearing and/or CMC to deal with all the disclosure issues in dispute, either the President or Mr Malek QC will be available in principle on one Friday each month to hear further disclosure applications, either matters that have been held over or new matters that may arise ("Friday Applications"). It is envisaged that any such hearings would deal with discrete issues between individual claimants and individual defendants. Outstanding issues in dispute between individual claimants and individual defendants may also be resolved on the papers if appropriate.
>
> 51. Before making any Friday Applications, the parties should engage with each other in a co-operative manner, in accordance with the governing principles, to seek to agree, as far as possible, any of the matters in dispute. As observed by Green J in Peugeot, "the efficacy of this process involves close and sensible cooperation between the parties and the experts". Failure to do so may result in a costs order being made against the relevant party should a misconceived application be brought before the Tribunal.
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> 52. The timetable for any Friday Applications is as follows:
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> …
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> (5) No later than two weeks before the hearing date: the relevant party is to file its application with supporting evidence and an updated extract from the relevant Redfern schedule. Supporting evidence is limited to a maximum of two witness statements (including one from an expert) and an exhibit of no more than 25 pages.
>
> (6) The Tribunal will confirm in writing to the parties whether the application is of a nature that is suitable for determination at a Friday hearing.

> (7) No later than one week before the hearing date: the respondent(s) to the application are to file any responsive evidence, which is subject to the same limits set out at (5) above.
>
> (8) Short skeleton arguments and a hearing bundle are to be filed two clear days before the hearing date.
>
> 53. As to the stage at which a particular disclosure application should be made, the Tribunal will adopt a common-sense approach with a view to maximising the most efficient use of the Tribunal's time and avoiding potentially inconsistent rulings on the same point. Therefore, if there are, for example, four defendants to a claim, and only three wish to pursue a disclosure application at a particular juncture, the Tribunal could well decide to proceed with hearing the application in which case the fourth defendant would need to be prepared to make submissions. Conversely, if a single defendant wishes to proceed with a disclosure application when the other defendants wish to defer it until a later stage, the Tribunal may defer consideration of the application until it can hear all defendants together."

18. The Disclosure Ruling sets out the approach which the Tribunal has adopted in relation to the disclosure across all seven "Trucks" actions, which until 2020 had been case managed together. In providing this ruling, I have followed the approach set out in the Disclosure Ruling and the procedure for dealing with the various types of disclosure applications as explained by the Tribunal in *Dawsongroup Plc v DAF Trucks NV* [2021] CAT 13 at [3]-[11].

19. The applicable rules and procedure in relation to disclosure in relation to these proceedings are set out in some detail in the Disclosure Ruling. The broad principles are summarised in the Disclosure Ruling at [35]:

> "Even in cases where broad disclosure is required, it is possible to lay down some broad principles that are applied by the CAT. These are:
>
> (1) Orders for standard disclosure will not in general be made.
>
> (2) Disclosure will be confined to relevant documents. Relevance is determined by the issues in the case, derived in general by reference to the pleadings, although in appropriate cases disclosure can be in relation to matters not specifically pleaded.
>
> (3) A strong justification would be required to make any order along the lines of the 'train of enquiry' test in the classic formulation of the test for disclosure enunciated by Brett LJ in *Compagnie Financière du Pacifique v. Peruvian Guano Co*. (1882) 11 QBD 55 at 63. An example where train of enquiry disclosure may be justified is a case alleging a cartel infringement where the underlying facts are unknown to the claimants but are in the hands of the defendants.
>
> (4) Disclosure cannot be ordered in respect of a settlement submission which has not been withdrawn or a cartel leniency statement (whether or not it has been withdrawn). This does not preclude a party which

made such a submission or statement providing it by way of voluntary disclosure.

(5) Disclosure will not be ordered in respect of a competition authority's investigation materials before the day on which the authority closes the investigation to which those materials relate.

(6) Ordinarily disclosure will be by reference to specific pleaded issues and specific categories of documents.

(7) Disclosure will only be ordered and the order will be framed to ensure that it is limited to what is reasonably necessary and proportionate bearing in mind a number of aspects, the most important of which are:

(a) the nature of the proceedings and the issues at stake;

(b) the manner in which the party bearing the burden of proof is likely to advance its case on those issues;

(c) the cost and burden of providing such disclosure;

(d) whether the information sought can be obtained by alternative means or be admitted; and

(e) the specific factors listed in r. 4(2)(c)."

20. The broad principles as to the Tribunal's general approach in relation to disclosure are provided in the Disclosure Ruling at [40]:

> "In light of that, we set out the following broad principles as to the general approach the Tribunal will take that affects disclosure.
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> (1) The initial burden of proof is on the Claimants to satisfy the Tribunal on the balance of probabilities that the Infringement had an effect on prices.
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> (2) If that hurdle is passed, the Tribunal will seek to arrive at a reasonable estimate of what the effect might have been and what any pass-on (within the relevant legal principles) might have been, again on the balance of probabilities.
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> (3) A reasonable estimate in this context means an estimate that is arrived at in a proportionate manner. We recognise of course that these are very large damages claims. However, any estimate will still be reached through averages, extrapolations and aggregates. It does not mean that every logical avenue that might be relevant can be explored, or that all data which is arguably relevant must be provided. As observed by Birss J in *Vodafone v Infineon Technologies AG* [2017] EWHC 1383 (Ch), at [31]:
>
> > "while of course more [disclosure] can be better …it is relevant to ask how much more would it be and how much better would it make the result."
>
> The decision as to what disclosure to order is appropriate is informed by the views of the economic experts but it is not determined by what data

they would like to have or what method they would like to use. It is for the Tribunal to decide.

(4) In reaching that decision, the Tribunal has regard to the principles of effectiveness, that cases should not be unreasonably difficult to bring, and of proportionality as set out in rule 60(2) read with the governing principles in rule 4 and also the Disclosure PD.

(5) It is not therefore simply a question of relevance, as some of the skeleton arguments we received seemed to suggest. Disclosure will only be ordered in relation to a specific category of documents if the Tribunal is satisfied the documents sought are relevant and that disclosure would be necessary and proportionate. The Tribunal will not make an order merely because it determines that the documents are relevant to the issues.

(6) These actions seek damages for loss on many hundreds of transactions, involving a very large number of vehicles, carried out over an extensive period, and in some of the cases by a very large number of claimants. Further, the Infringement involved contacts and communications between the participants over a 14 year period, with different involvement on the particular occasions. The approach to proof of causation and quantification, both as regards any overcharge and as regards pass-on, will therefore be very different from that which can apply where the claim is for loss on one or two very large transactions concluded following extensive negotiation: cp. *BritNed Development Ltd v ABB AB* [2018] EWHC 2913 (Ch). It is unlikely to be realistic in these cases for the issues to be approached by examining each price charged for each transaction subject to the claim and seeking to ascertain how any antecedent exchange of information or coordination between the OEMs may have influenced that price (whether directly or by reference to a gross price). Similarly, as regards pass-on, it would appear to be disproportionate even if it were possible to consider the resale or disposal of each truck that is subject to the claim. Accordingly, it is important to establish how in practice the issues at trial will be approached, and to do so before and not after vast time, effort and expense is devoted to yet further disclosure."

(2) Disclosure in the *Ryder* proceedings

21. Disclosure in the Ryder proceedings is summarised in my ruling on the Defendants' disclosure application heard on 6 July 2022 ([2022] CAT 32) (the "July 2022 Disclosure Ruling"), so it is not necessary to repeat what is stated there which largely deals with the Claimants' disclosure: see the July 2022 Disclosure Ruling at [17] to [27]. In this section I deal with the disclosure from the Commission File provided by the Defendants.

22. The relevant background in relation to disclosure from the Commission File in these proceedings is set out in Burrows 13:

"3.1 The version of the Commission File that was disclosed to the Ryder Claimants in these proceedings was based on the version that the DAF Defendants had been ordered to disclose to Royal Mail/BT in their separate proceedings against the DAF Defendants.

3.2 However, before disclosure of the Commission File to Royal Mail/BT, the DAF Defendants were also permitted to exclude certain categories of documents including "*documents related solely to products other than Trucks*" (the **"Excluded Documents"**).

3.3 Additionally, prior to disclosure of the Royal Mail/BT Commission File to the Ryder Claimants, the DAF and Iveco Defendants were permitted to conduct a further relevance review and, pursuant to that review, they withheld various additional categories of documents including "*documents relating to the market for and pricing of spare parts*" (the **"Withheld Documents"**).

[…]

(A) The Excluded Documents

3.5 On 18 December 2017, Rose J (as she then was) ordered the DAF Defendants to disclose the Commission File to Royal Mail/BT, with the exception of:

(a) privileged material or leniency documents; and

(b) three excluded categories of documents that were not considered relevant in the Royal Mail/BT proceedings. These were:

(i) documents related solely to products other than Trucks (as defined in recital 5 of the Settlement Decision);

(ii) documents created before 17 January 1997 or after 18 January 2011 (exclusive) other than documents created for the purposes of the OFT or Commission investigation; and

(iii) documents related solely to prices charged to customers in Member States other than the UK.

3.6 In respect of the first of these categories (i.e. the Excluded Documents), recital 5 of the Settlement Decision reads as follows:

> *"The products concerned by the infringement are trucks weighing between 6 and 16 tonnes ("medium trucks") and trucks weighing more than 16 tonnes ("heavy trucks") both as rigid trucks as well as tractor trucks (hereinafter, medium and heavy trucks are referred to collectively as "Trucks"). The case does not concern aftersales, other services and warranties for trucks, the sale of used trucks or any other goods or services sold by the addressees of this Decision." (emphasis added)*

(B) The Withheld Documents

3.7 The Ryder Claimants sought disclosure of the Royal Mail/BT Commission File on 22 June 2018. On 31 July 2018, Roth J ordered the DAF Defendants to disclose the Royal Mail/BT Commission File

to the Ryder Claimants, subject to a further relevance review to be conducted by the DAF and Iveco Defendants.

3.8 This further review resulted in the removal of additional documents across 18 different categories. One of those categories (category P) included *"documents relating to the market for and pricing of spare parts"*."

(footnotes omitted)

23. Subsequent to the disclosure from the Commission File, as explained in the next section, the pleaded cases of the parties have evolved. In particular both Daimler and the VT/RT Defendants have introduced pleas that in assessing the Overcharge there should be deducted discounts for ancillary products and services sold alongside the Trucks. These contentions were advanced initially in 2021, but it took time for these matters to be reflected in the served pleadings, in part due to the extensive correspondence between the parties on them and whether or not permission for the amendments would be consented to.

(3) Pleaded cases on ancillary products and services (the "Bundled Products Pleas")

24. The starting point for what are in issues in any action and hence relevance for the purposes of disclosure are the pleadings between the parties. In considering the Application it is important to consider the pleaded cases of the parties, which have evolved during the course of the proceedings.

25. Ryder's Amended Particulars of Claim filed in September 2019 themselves refer to exchange of sensitive information and collusion relating to Buybacks, maintenance and service contracts, Warranties and Truck spare parts[2] (including coordinating price increases for spare parts). Ryder's position is that these separate instances of coordination reinforced the stability and effects of the Trucks cartel. It does not plead a separate standalone legal infringement of competition law in relation to those products/services.

26. The Bundled Products Pleas, as they currently stand, are set out in the Re-Re-Amended Defences, permission for which was granted between December 2021

[2] See paragraph 62D of the Re-Amended Particulars of Claim.

and January 2022. Those Pleas assert that the Value of Commerce should be adjusted (i.e. reduced) to account for discounts on products sold alongside Trucks:

(1) Daimler's Bundled Products Plea (Re-Re-Amended Defence, paragraph 38(a)(iA)), which lists the Bundled Products it asserts to be relevant, states:

> "in calculating the level of the Overcharge (if any) it is necessary to deduct from the Truck prices forming the value of commerce the effect of any discounts obtained on any bundled products (comprising service contracts, extended warranties, buy-backs and trade-ins) that the Claimants purchased in connection with such Trucks which were offered by Daimler in order to support the sale of the said Trucks and which therefore were relevant to the effective net price of the said Trucks…"

(2) Volvo/Renault's Bundled Products Plea (Re-Re-Amended Defence, paragraphs 37 and 38, also known as its "Total Value Plea", states:

> "the value of commerce should be calculated by reference to (1) the price of the Truck itself…; less (2) discounts on other goods and services sold alongside the truck as part of the same transaction" (paragraph 37).
>
> "Further and/or in the alternative, the Claimants received at least the same total value (taking into account the price paid for the truck and any discounts on other elements of the transaction that were granted in order to incentivise the purchase of the truck) as they would have done had the Infringement not taken place. The price paid should take into account… discounts on other goods and services sold alongside the truck as part of the same transaction…" (paragraph 38).

(3) On 24 June 2022 under the cover of a letter from Freshfields Bruckhaus Deringer, the VT/RT Defendants provided a spreadsheet which indicated what products and services that they considered would fall within their Bundled Products Plea, which included warranties, buybacks, servicing, repair and maintenance services (including spare parts). In addition the VT/RT Defendants have provided a Guidance Note to accompany the witness statements regarding Total Value Plea, which assists in understanding their case on the relevance and alleged impact on Total Value of discounts on Bundled Products.

27. Ryder's Re-Re-Amended Reply filed on 11 March 2022 puts in issue as to whether or not Daimler and the VT/RT Defendants are able to rely on the

alleged discounts from Bundled Products in reducing any Overcharge on Trucks sold. Thus the pleading includes the following in relation to the VT/RT Defendants' plea (similar wording is used in the reply in relation to Daimler's plea), at paragraph 9(ii):

> "it remains incumbent on the Volvo Defendants to establish proximate causation between any discounts on the prices paid by the Claimants for such separate goods and services or on other elements of the transaction (if any) and/or further value received by the Claimants (if any) and the infringing conduct and/or the purchases that were subject to the Overcharge. It is therefore for the Volvo Defendants to establish a reduction in the Claimants' loss when compared to a counterfactual in which all aspects of the collusive behaviour were absent, including the collusion between the Defendants as regards goods and services sold alongside Trucks, as to which the Claimants have pleaded in their Re-Amended Particulars of Claim. The Volvo Defendants plead no such causation. In any event, the existence of any such relevant discount and/or further value received by the Claimants is denied."

28. It therefore appears that Ryder is seeking to place an evidential burden on the VT/RT Defendants and Daimler for them to show an absence of collusive behaviour in respect of Bundled Products where it is sought to reduce the Overcharge by reference to discounts given on such products and services. Whether or not it is for Ryder to rebut reliance on such discounts by establishing collusion in respect of its sale or supply or it is for the Daimler and VT/RT Defendants to show an absence of such collusion in order to rely on them is a matter to be determined in due course and not on this application. It is clear that on this Application Ryder is seeking evidence of such collusion that may be found in the Commission File even though the Decision itself made no such finding and the topic fell outside the Decision.

D. PARTIES' SUBMISSIONS

(1) Ryder

29. Ryder seeks disclosure of documents from the European Commission's administrative file in Case *AT.39824 – Trucks* (the "Commission File") relating to products and services that were sold by the Defendants to Ryder together with the trucks to which Ryder's claim relates ("Bundled Products"). The relevant documents were excluded and/or have been withheld on grounds of relevance from the disclosure so far given.

30. Ryder says that the documents are needed in order to address an argument raised by the Application Defendants (but not DAF) in defence of the claim. It says that the discounts or subsidies given in respect of Bundled Products should be deducted from the price of the trucks supplied when determining the Value of Commerce and modelling the Overcharge in these proceedings[3].

31. Ryder has pleaded that it is entitled to claim the Overcharge on the Trucks it acquired as the prima facie measure of its loss (paragraph 77 of the Re-Amended Particulars of Claim). That is to say, Ryder's losses should be assessed according to the standard measure of cartel behaviour, namely the price of the cartelised product – the Truck – itself. The consequence of the Application Defendants' Bundled Products Pleas (set out above) is that the Tribunal will need to determine at trial whether it should depart from that standard and established measure of the harm caused by cartel behaviour, in favour of reducing the price to reflect alleged discounts offered on Bundled Products. As a result of those discounts, it is said that Ryder received at least the same total value as it would have done absent the cartel.

32. Clearly, however, if the Bundled Products were themselves the subject of the cartel activity, it cannot be assumed that the value represented by any discounts on the Bundled Products would have been the same absent the cartel. The prices of the Bundled Products may themselves have been inflated or the level of any discounts may have been reduced.

33. It is therefore relevant to understand whether, and if so to what extent the Defendants colluded in relation to Bundled Products.

34. Ryder submits that the disclosure already provided contains indications that Bundled Products were indeed within the scope of the cartel activity. The picture is, however, incomplete in circumstances where the evidence gathered by the Commission relating to the activities of the cartel in relation to Bundled Products continues to be withheld. Such evidence has now become directly relevant to assessing the extent to which the terms on which Bundled Products were supplied may have been tainted by the cartel.

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[3] See paragraph 23 above.

35. The Tribunal will need to decide between calculations of loss which include alleged discounts on Bundled Products and those which do not. The evidence as to the activities of the cartel in connection with these products will be necessary for the Tribunal to determine whether deduction of the discounts may be contemplated on the basis that it would more fairly reflect the impact of the cartel.

36. Ryder notes that the parties' experts will also need to opine as to whether the appropriate measure of loss should include discounts.

   (1) Ryder's expert economist, Dr Lawrence Wu, considers that such evidence is needed to inform his opinion as to whether discounts could reliably be deducted from the price of trucks when assessing the effects of the cartel: Wu 7, paragraphs 3.3, 5.1 and 5.8.

   (2) Dr Wu, in Wu 7, gives two examples which illustrate how contemporaneous documents of the kind likely to be contained in the categories of the Excluded Documents and the Withheld Documents need to be reviewed to test the assumption that concertation with respect to the Bundled Products could not have affected "discounts" on those products and services:

      (a) First, as Dr Wu explains at paragraphs 5.2-5.7 of Wu 7, collusion such as that evidenced at the 1 December 2003 UK Peers Group meeting (where the minutes state that "*All agreed that parts prices will be increased directly in line with currency movements*") could have resulted in the artificial inflation of the list price of spare parts, which would then mean that any "discount" from that price taken into account when assessing the Value of Commerce would be distorted (i.e. too high) on account of the cartel. As Dr Wu explains, that in turn would lead to an unduly large reduction in the Value of Commerce and a calculation of a lower Overcharge when in reality customers were paying more for discounted spare parts than they would have done in the non-cartel world.

(b) Second, as Dr Wu explains at paragraphs 5.8-5.14 of Wu 7, collusion such as that which occurred at the competitors' meeting that took place in Brussels in January 2001, at which the Defendants agreed to stop offering extended warranties free of charge and instead offer them to customers as part of a package including a maintenance contract, could result in the creation of a product that would not have existed but for the cartel. Any "discount" on such a product, if considered in a Value of Commerce calculation, would be in respect of a product that a customer only purchased because of the cartel, which is plainly problematic.

(3) Ryder alleges that Volvo/Renault's expert Mr Biro has shifted from his earlier position, set out in paragraph 20 of Biro 6, that his analysis needed to "clean" Bundled Products prices of any cartel effect, i.e. that "*it is relevant… to <u>ensure</u> that <u>any effects of the infringement on price reductions</u> [on related products and services] <u>are captured in an assessment of the overcharge</u>*" and "*it is <u>appropriate to assess</u> whether there is <u>any evidence to suggest that the prevalence of these price reductions differed as between the infringement period and the post-infringement period</u>*" (emphases and insertion added). Mr Biro's position now, stated at paragraphs 6 and 7 of Biro 7, is that although he accepts the logic of Ryder's position that discounts on Bundled Products could have been distorted by cartel activity, neither he nor his colleagues intend to test the extent of any distortion:

> "6. LW7 sets out certain potential concerns that are considered to be relevant in calculating the value of commerce and estimating the overcharge, insofar as these analyses were to recognise the revenue provisions relating to ancillary products and services […] I consider that this could be as follows:
>
> (a) the infringement <u>may have led to an overcharge on the ancillary products and services</u> that were sold by VT/RT alongside trucks;
>
> (b) this <u>may have affected the magnitude of the price reductions</u> on the ancillary products and services that were granted by VT/RT in order to incentivise the sale of a truck, <u>to the extent that these price reductions were larger than they would otherwise have been as a result of the effect of the infringement</u> on the prices of the ancillary products and services; and

(c) this would be reflected in the revenue provisions that were recorded by VT/RT against the trucks prices in order to account for the relevant price reductions. **Accounting for the revenue provisions in the measure of trucks prices** that is used to calculate the value of commerce and estimate the overcharge **would therefore lead to an inappropriately reduced quantum of loss.**

7. The implication of this is that for the potential concerns that are set out in LW7 to be valid, there would need to have been an overcharge on the ancillary products and services that were sold by VT/RT. However, **I understand that none of the economic experts who are involved in the Ryder Proceedings propose to conduct an empirical analysis that would allow one to determine whether such an overcharge existed"**. (emphases added).

37. It therefore appears, according to Ryder, that Mr Biro intends to control for an offsetting effect in his Overcharge calculation based on an arbitrary assumption that the cartel was incapable of affecting the pricing of Bundled Products, with no accompanying sensitivity analysis or other testing. The requested disclosure is needed so that Dr Wu (in his reply report) and the Tribunal can assess the appropriateness of that assumption.

38. Ryder submits that the Tribunal has previously recognised that it will be important at trial to look beyond any alleged discounts on Bundled Products and to consider contemporaneous evidence as to the pricing of Bundled Products more generally. As Roth J observed at the October 2021 CMC: what was "*relevant to assess the point*" was "*not simply discounting but also the underlying pricing of ancillary products and services. The discount cannot be looked at in isolation*" (emphases added).[4] The extent of collusive activity in relation to Bundled Products are an essential part of the broader picture.

39. Ryder further submits that the disclosure is also proportionate. The documents sought are contained in a discrete and pre-assembled corpus of Commission File materials. They have already been processed and identified, and the number of documents is small.[5]

40. As to any concerns regarding the need to consult other addressees of the Settlement Decision (and Scania) who may have claims that the requested

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[4] Roth J, Extract from October 2021 CMC Transcript, Day 1 (page 37) {4/29}.

[5] The pool of documents from which the disclosure would be given numbers around 4,300 documents; and the documents responsive to this application may only be a subset of that.

documents should be withheld or redacted, Ryder refers to the consultation process that took place in the Royal Mail proceedings prior to the disclosure of the Commission File by the DAF Defendants which may have covered all but 58 of the requested documents. If it did not, then Ryder does not object to a short further consultation, which Ryder suggests should take no more than 14 days.

(2) Daimler

41. Daimler contends the Application is based on the incorrect premise that Ryder has pleaded a case that the Defendants engaged in unlawful collusion in relation to ancillary products/services in a manner which affected the prices of those products. It also proceeds on a misunderstanding as to the nature of Daimler's defence. Finally, the disclosure sought is not adequate for the purposes of their own expert's intended analysis.

(a) Ryder's pleaded case

42. Daimler submits Ryder's claim is avowedly a follow-on claim for damages, brought under section 47A of the Competition Act 1998, in respect of the Decision. The infringing conduct found in the Decision relates solely to "Trucks", as carefully defined at recital (5) of the Decision.

43. As recognised by Mr Burrows in Burrows 13, Ryder has not pleaded a separate stand-alone infringement of competition law in relation to ancillary products/services.

44. Despite not having pleaded any stand-alone infringement in relation to ancillary products/services, Daimler contends that the Application is effectively premised on the assumptions that (i) there was unlawful coordination between the Defendants in relation to ancillary products/services, and (ii) that coordination had an effect on the pricing of ancillary products/services. For example, Dr Wu says that the requested disclosure will allow him to analyse "*the extent of the cartel's impact on the price and supply terms of Ancillary Products*".

45. Ryder seeks to justify its Application in part on the basis that in its Re-Amended Particulars of Claim, it refers to a limited number of alleged instances of coordination in relation to ancillary products/services (see Burrows 13, section 5). By reference to that handful of allegations, the Re-Amended Particulars of Claim includes the extremely vague assertion that these alleged instances of coordination "*reinforced the stability and effects of the Trucks cartel*". However, the Re-Amended Particulars of Claim falls well short of particularising a standalone infringement in respect of ancillary products/services, or alleging that the so-called "*reinforcing*" conduct had any effect on the prices of ancillary products/services. The Re-Amended Particulars of Claim is clear that trucks are the <u>only</u> product in respect of which an overcharge is alleged.

46. Daimler considers that, in circumstances where there is no pleaded allegation that coordination in relation to ancillary products/services constituted an infringement of competition law in its own right, and no pleaded allegation that any such coordination had an effect on the prices of ancillary products/services, the requested disclosure is a clear example of what the Tribunal described in the *Disclosure Ruling* at §40(3) as disclosure that an expert would "*like to have*", but which is not relevant to the pleaded issues. Ryder's vague and limited allegations of reinforcing conduct are insufficient to bring into dispute the question of whether the alleged collusion had an effect on the prices of ancillary products.

47. Daimler states that the Tribunal has previously made clear in the course of the Trucks proceedings that applications for disclosure which are not relevant to the pleaded issues will be refused:

    (1) Ryder itself previously brought an application for disclosure of documents relating to warranties, repair and maintenance contracts and spare parts. The application was dismissed, including on grounds that the disclosure sought did not correspond to any pleaded allegations. Indeed the Tribunal described the application as "*seriously misconceived*";

(2) At the March 2022 CMC, the Tribunal refused an application by the VSW Claimants for disclosure of documents relating to spare parts, on the basis that spare parts were not part of the infringement and no claim was made for an overcharge on spare parts. The Tribunal said that *"[s]pare parts were not part of the infringement. No claim is made for an overcharge on spare parts. It is true that there are very few documents in this category, specifically 58 documents, but numbers alone are not a basis for disclosure. We do not think that they are relevant. We therefore refuse to direct disclosure of category P*".

48. The Tribunal should reject the Application on the same basis.

(b) Ryder's misunderstanding of Daimler's pleaded case

49. Daimler submits, as noted above, and perhaps in recognition of the irrelevance of the requested disclosure to their own pleaded case, Ryder asserts that the requested documents are necessary to respond to Daimler's 'bundled products' plea. This assertion rests on a straightforward misunderstanding of Daimler's case.

50. Daimler's Bundled Products Plea is set out at paragraph 26(1) above. In short, Daimler's case is that the sale of ancillary products which incentivised Truck purchases is relevant to the volume of commerce calculation, because it is necessary to deduct any discounts on bundled products from Truck prices, in order to isolate the net price of the 'bare' Truck. It is the 'bare' Truck price that should be the basis for the volume of commerce calculation (see Lavender 1, §28). This ensures that Truck prices are as comparable as possible over time (see Lavender 1, §29).

51. In response to Daimler's bundled products plea, Ryder's Re-Re-Amended Reply states at paragraph 9A(i) that:

> "…it remains incumbent on the Daimler Defendants to establish proximate causation between discounts on the prices paid by the Claimants for such products (if any) and the infringing conduct and/or the purchases that were subject to the Overcharge. It is therefore for the Daimler Defendants to establish a reduction in the Claimants' loss when compared to a counterfactual in which all aspects of the collusive behaviour were absent, including the

> collusion between the Defendants as regards goods and services sold alongside Trucks, as to which the Claimants have pleaded in their Re-Amended Particulars of Claim. The Daimler Defendants plead no such causation which is in any event, denied;
>
> it is specifically denied that discounts on the prices paid by the Claimants for such separate products (if any) caused the Daimler Defendants' sale of any Truck to the Claimants. In any event, the subjective intention of the Daimler Defendants in offering the discount is legally irrelevant because the Daimler Defendants must demonstrate proximate causation between any alleged discount received by the Claimants and the infringing conduct and/or the purchases that were subject to the Overcharge."

52. Daimler contends that the Re-Re-Amended Reply reveals a serious misunderstanding of Daimler's case on this issue:

    (1) Daimler's Re-Re-Amended Defence does not raise any issue of <u>causation</u> between discounts on the prices paid by Ryder for ancillary products and the alleged infringing conduct. In other words, Daimler does not assert that the discounts were a benefit that were only available to the Claimants as a result of the Infringement, and which should therefore be "offset" against any alleged overcharge. Rather, Daimler simply argues that any discounts on bundled products which were offered to support the sale of Trucks ought to be deducted from the volume of commerce.

    (2) The reference in Daimler's Re-Re-Amended Defence to a "*counterfactual in which all aspects of the collusive behaviour were absent*, *including the collusion between the Defendants as regards goods and services sold alongside Trucks*" rests on the incorrect assumption, referred to above, that Ryder has pleaded a case that there was any <u>unlawful</u> collusion in relation to ancillary products/services. It is only if Ryder had done so that it would be necessary or appropriate to consider a counterfactual in which that alleged collusion is absent (the purpose of a counterfactual analysis being to test what would have happened to prices in the absence of the conduct that is alleged to be <u>unlawful</u>). However, as explained above, Ryder has not pleaded any such case in relation to ancillary products.

53. Daimler further submits that Ryder places significant emphasis on a comment made by the Tribunal at the CMC in October 2021, concerning the need to look at the underlying pricing of ancillary products and services. However, the comment is taken out of context. The comment in question was made in the context of an application by the Ryder and Dawsongroup Claimants for a statement setting out "*how [bundled products] discounts were offered and on what basis, in what circumstances…*".[6] The Tribunal declined to order such a statement, but indicated that it would be open to the parties addressing this topic in factual evidence. Importantly, and contrary to the implication in Burrows 13, there was no suggestion that this would involve an investigation as to whether there was any collusion in relation to ancillary products, let alone substantial disclosure on that topic. Rather, the Tribunal's concern was to understand "*how the discounts and bundled product analysis worked throughout the period of the cartel*".[7] That concern has been satisfied by the witness evidence served since the October 2021 CMC (as to which, see Lavender 1, Annex A).

(c) Requested Disclosure not adequate for Dr Wu's desired analysis

54. Dr Wu states that the requested disclosure is necessary to analyse "*the impact of the cartel on the pricing and supply terms of Ancillary Products/Services in order to determine what level of discount (if any at all) was applied to an Ancillary Product/Service"* (Wu 7, §5.7). Daimler agrees with the position set out in the VT/RT Defendants' responsive evidence that the type of analysis to which Dr Wu is referring would require very significant quantitative material in respect of the pricing of ancillary products/services. The requested disclosure would not enable such an analysis to be carried out.

55. Daimler states that it has already provided disclosure of all of the information that is required to understand and respond to Daimler's Bundled Products Plea:

    (1) A detailed explanation of the impact of ancillary products on Truck prices has already been provided in Daimler's witness evidence, which was prepared in the light of the Tribunal's comments at the October 2021

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[6] Transcript of October 2021 CMC, Day 1, p.16, lines 7 – p.17 line 4.
[7] Transcript of October 2021 CMC, Day 1, p.27 lines 1-2.

CMC. Daimler has also provided a pricing statement describing how bundled sales were managed internally.

(2) In addition to the detailed explanations that have been provided in Daimler's witness statements and pricing statement, Ryder has also been provided with extensive quantitative data in relation to buybacks, service contracts and warranties (see Lavender 1, paragraph 36 and Annex A). As Mr Lavender explains, from this data, it is possible to arrive at the starting price for any given ancillary product purchased by Ryder.

56. As the Tribunal explained in the Disclosure Ruling at [35(7)], it will only be proportionate to order disclosure where it is reasonably necessary, and this includes consideration of whether the information sought can be obtained by alternative means. For the reasons above, Daimler considers that Ryder already has access to information which enables it to calculate the starting price of any ancillary products/services (although, for the avoidance of doubt, Daimler's case is that it is not in fact necessary to analyse those starting prices, only to analyse the discounts on ancillary products/services). In those circumstances, Daimler submits that it would be both disproportionate and unnecessary to grant the requested disclosure.

(d) Delay and proportionality

57. According to Daimler, even if the requested disclosure was relevant and reasonably necessary to the analysis that Dr Wu envisages conducting (which it is not), the Application should be rejected on the grounds of delay alone.

58. Daimler submits, having first issued their claim in 2018, Ryder has had ample opportunity to advance a properly pleaded claim in respect of collusion on ancillary products and services, and/or to pursue an application for the requested disclosure, but it has failed to do so. Instead, Ryder has waited until an extremely late stage to make the Application. Aspects of the requested disclosure were debated in the Redfern Schedule process that concluded in March 2021, with Daimler making it clear that it was unwilling to provide such

disclosure. Ryder could have pursued an application for the requested disclosure at any point thereafter.

59. According to Daimler the fact that Daimler first included specific reference to ancillary products in its Re-Re-Amended Defence (which was provided in draft to Ryder on 14 June 2021 and served on19 February 2022) does not excuse Ryder's delay. Ryder waited almost six months since the Re-Re-Amended Defence was served before bringing the Application. This is despite the Re-Re-Amended Defence clearly identifying which ancillary products Daimler contends are relevant to identifying the effective net price of Trucks.

60. Daimler further submits that, even with the short extension to the filing of expert reports agreed between the parties, the experts will not be able to meaningfully consider the requested disclosure in their main reports. Even if it were realistically possible to consider the requested disclosure in time for reply expert reports (which is very doubtful given that it consists of thousands of documents), it would obviously not be appropriate for Dr Wu to wait until his reply expert report to address the requested disclosure, since this would not give Daimler a fair opportunity to respond.

61. Daimler considers if the Application were to be granted, Daimler would have to conduct a review of over 4,300 documents for relevance, commercial sensitivity, leniency and privilege. This would involve a disproportionate amount of time and effort at a time when the parties are focused on finalising expert reports and moving into a period of intensive preparation for a long trial.

62. In addition, if the Application is granted, the Defendants would need to liaise with the addressees of the Decision who are not parties to the Application. The requested disclosure may contain material that those parties may legitimately wish to redact on grounds of privilege or leniency, as well as material that is confidential to the third parties concerned. This would be a time-consuming exercise, again requiring considerable resource.

63. Daimler states this level of expense and resource would not be proportionate in circumstances where, as explained above, the requested disclosure is irrelevant and sought far too late in the day for it to be efficiently and fairly factored into

the expert process. It would not be consistent with the Tribunal's governing principles of dealing with cases justly and at proportionate cost, including by minimising costs, to impose upon Daimler a costly and time-consuming new disclosure exercise at such a late stage in the trial timetable.

(3) VT/RT Defendants

64. The VT/RT Defendants contend that the appropriate measure on which the value of commerce and overcharge analysis at the trial should be based is (1) the price of the truck; (2) less any price reductions offered by the VT/RT Defendants on ancillary products, insofar as these were offered in order to incentivise the purchase of the truck itself.

65. Ryder has not pleaded any positive case on the Total Value Plea, save to deny that any price reductions on ancillary products in fact caused the purchase of any truck. Ryder states in its evidence for the Application that it does not accept that it is appropriate to reduce the value of commerce to reflect price reductions on ancillary products.

66. Ryder alleges in its Reply as served in March 2022 that "[i]*t is therefore for the Volvo Defendants to establish a reduction in the Claimants' loss when compared to a counterfactual in which all aspects of the collusive behaviour were absent, including the collusion between the Defendants as regards goods and services sold alongside Trucks, as to which the Claimants have pleaded in their Re-Amended Particulars of Claim*".

67. As Burrows 13 notes at paragraph 5.1, the Ryder Re-Amended Particulars of Claim mention various ancillary products in the context of their allegations as to the Infringement. Mr Burrows confirms at paragraph 5.2 that Ryder does not intend to allege an infringement in respect of ancillary products.

68. Instead, Mr Burrows states that Ryder's "*position is that these separate instances of coordination reinforced the stability and effects of the Trucks cartel*"[8]. The VT/RT Defendants submit that "*position*", which appears to be a

[8] Burrows 13 at paragraph 5.2.

positive case at odds with Ryder's overall position on total value, is nowhere pleaded. Neither is Mr Burrows and Dr Wu's contention that the value of commerce analysis should not take account of price reductions on ancillary products if/to the extent that they reflected increased prices due to collusion.

69. The VT/RT Defendants state that the Total Value Plea has been part of their case since 2018. At the October 2021 CMC, following resistance by Ryder, the Tribunal directed that the expert value of commerce analysis should be undertaken both with and without taking account of the Total Value Plea.[9] Ryder then consented to minor clarificatory amendments to VT/RT Defendants' Defence on total value.

70. According to the VT/RT Defendants, the point made by Ryder in its Reply (see paragraph 66 above) does not either make a positive case or advance the specific point now made by Mr Burrows. If Ryder wished to seek disclosure of documents relating to alleged collusion regarding ancillary products, it could and should have sought permission to amend its Reply to reflect the case it apparently now wishes to make at trial as to the relevance of the pricing of ancillary products to the price reductions to be taken into account under the Total Value Plea. That could have been done at any time since 2018, or at the very latest in response to the VT/RT Defendants' clarificatory amendments in 2021. The VT/RT Defendants would then have had a proper opportunity to respond to any such amendments. It is chaotic and unacceptable for the Tribunal to be faced with a disclosure application based on unpleaded allegations.

71. The VT/RT Defendants submit the documents sought will not enable Dr Wu to carry out the analysis set out in paragraph 54 above. Ryder has applied for disclosure of contemporaneous documents from the Commission File regarding Ancillary Products, e.g. evidence about whether the addressees exchanged information in relation to maintenance services. The fact that the Commission File includes documents relating to ancillary products does not demonstrate that there was an infringement in respect of them, which were expressly carved out of the scope of the Decision.

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[9] Order of 11 February 2022/para 18(a).

72. In order to carry out an empirical economic analysis of whether or to what extent any such conduct caused a rise in the prices of Ancillary Products, the VT/RT Defendants state Dr Wu would also need access to large volumes of quantitative data and information on the pricing of such products. The qualitative documents sought by Ryder would not enable that exercise to be undertaken.

73. The VT/RT Defendants state Ryder does not seek disclosure of the quantitative data that would be required to undertake the exercise envisioned by Dr Wu. No party has so far proposed that such material should be disclosed, and no investigations have been carried out into whether it exists. Embarking on such investigations now, when primary expert reports are due imminently and with the trial due to commence in under six months, would be unfeasible without endangering the trial date.

74. The VT/RT Defendants also reiterate the points raised by Daimler that disclosure sought by Ryder is disproportionate (see paragraphs 61 to 63 above). In addition, the disproportionality of the exercise sounds with particular force in respect of documents relating to spare parts (namely all of the Withheld Documents and probably also some of the Excluded Documents). The Total Value Plea does not extend to price reductions on freestanding sales of spare parts. Although the pricing of repair and maintenance contracts may have been influenced by the cost of spare parts, the extent of any such influence is unknown. The VT/RT Defendants also do not know whether there would be any way of deconstructing the pricing of repair and maintenance contracts to identify whether the pricing of spare parts was a material factor.

75. In relation to timing, the trial is due to start in March 2023, under six months from now. Ryder's proposal is that Dr Wu should address the extent to which price reductions on ancillary products should be taken into account for the value of commerce analysis in his reply report in early December 2022. That would leave the VT/RT Defendants' expert with no opportunity to respond to Ryder's expert evidence, and would also deny the VT/RT Defendants the chance to address the pricing of ancillary products in factual evidence (which was exchanged in March and June 2022). The disclosure sought cannot fairly be

ordered since the VT/RT Defendants would have no opportunity to address it in evidence without imperilling the trial date.

E. ANALYSIS

76. In determining the Application, I take into account the following factors in assessing whether or not to order the disclosure sought would be both necessary and proportionate:

    (1) the relevance of the documents sought by reference to the pleadings;

    (2) how the parties are likely to advance their cases on the issues in question (i.e. the Bundled Products Plea);

    (3) the importance of the disclosure sought, both in relation to the case as a whole, and how profitable the disclosure exercise is likely to be;

    (4) the cost and burden of the disclosure;

    (5) whether the information has already been provided or has been admitted or can be obtained from an alternative source or means;

    (6) the stage at which the action has reached, including delay and the impact on the trial, both in respect of its preparation and the trial date;

    (7) whether the Application is precluded or at least affected by any previous ruling of the Tribunal in these proceedings in relation to the same category of documents; and

    (8) the amount of disclosure already provided by the parties.

(1) Relevance

77. I have no doubt that the disclosure sought is relevant to the issues as they are currently pleaded. The Daimler and VT/RT Defendants seek to offset discounts by way of the Bundled Products Plea on warranties, buy-backs, maintenance contracts (including spare parts) and trade-ins against the Overcharge. If the

level of the discount themselves are the product of collusion then that may have an impact on whether or not the discount should be factored in and, if so, for what amount.

78. I am not persuaded by the submissions of the Daimler and VT/RT Defendants that such a contention is irrelevant on the basis there is no positive claim made by Ryder that the Infringement extends to Bundled Products. Actual or possible collusion in respect of warranties, buy-backs, maintenance contracts/services, including spare parts, have been pleaded in the Amended Particulars of Claim served in September 2019. Thus, Ryder has been able to make these allegations on the disclosure already provided but it may well be able to give further examples and give a better feel for the scale and the scope of such collusion if the disclosure sought is provided. I note, as pointed out by Ms Abram KC on behalf of the Defendants, that there is no causal link pleaded in the Particulars of Claim between the alleged collusion and the pricing of the discounted products, but that is not a surprise given that, at the time the pleading was introduced, there was no Bundled Products Plea.

79. Further, collusion in relation to Bundled Products has become a real issue on the pleadings since Daimler and the VT/RT Defendants introduced their Bundled Products Plea in their Re-Re-Amended defences filed in February 2022. Ryder in its Re-Re-Amended Reply have responded to that pleading. The position of Ryder is that if there has in fact been collusion, then it would be unfair to include the discounts either at all or at face value.

(2) How the parties are likely to advance their case on Bundled Products

80. It is evident that the Daimler and VT/RT Defendants wish to and will advance their case and expert evidence on Bundled Products without reference to any impact collusion may have had on discounts. Their factual evidence to date, so far as I am aware, does not address this either.

81. Ryder intends to advance its case in response to the Bundled Products Plea in two ways. First, to exclude discounts from the Overcharge in principle (i.e. irrespective of collusion). Secondly, to modify the level of discounts as a deduction from the Overcharge on the basis that:

(a) there was in fact collusion in respect of the Bundled Products; and

(b) it is for the Daimler and VT/RT Defendants to establish that the discounts were not affected by collusion.

82. Even in the absence of the disclosure sought, Dr Wu in his reply expert evidence, at the very minimum, will be raising these matters as an issue, and the other side may wish to serve not just expert evidence but they may have some supplemental factual evidence. That said, at the time they served their factual evidence, the Defendants were aware that Ryder had pleaded and were relying on some evidence of actual or potential collusion in respect of Bundled Products such as warranties, as set out in the Re-Amended Particulars of Claim.

83. The Defendants seek to make a lot out of the fact that Ryder is not seeking to quantify the impact of the collusion on discounts; it is a more general plea. But the mere fact it is a more general plea does not make it irrelevant or unfair to seek this disclosure. There may be a great deal of difference in the mind of the Tribunal if it transpires that in fact there are only a few isolated and insignificant incidents of actual or potential collusion in respect of Bundled Products. In contrast, if the further disclosure sought evidences extensive collusion in respect of the Bundled Products, it may be open to the Tribunal to conclude, or at least it would be possible for Ryder to argue, that no allowance should be made for the discounts at all because one cannot be confident that the discounts have not been affected by collusion. An alternative may be to give some allowance for discounts but at a modified rate to reflect collusion even if the actual impact on the discounts cannot be precisely quantified. In any event, the very minimum is that the point is arguable and is on the pleadings.

(3) Significance and utility of disclosure sought

84. I am satisfied that the disclosure sought is relevant, but how significant and useful is the disclosure likely to be?

85. Disclosure in respect of spare parts is, in my view, unlikely to be of great utility. There is no free-standing claim for infringement in respect of spare parts. The

Daimler and VT/RT Defendants are not including discounts on free-standing supplies of spare parts as part of their Bundled Products Plea. Most of the pricing of and discounts on spare parts is only indirectly relevant as the pricing of spare parts might be a factor in determining the pricing of warranties and maintenance contracts. It may be quite a leap to quantify the impact of any collusion on maintenance contracts and their discounting arising from any collusion in respect of spare parts. I put this point to Mr Holmes KC during the course of argument and he accepted the force of that point. He made it clear that his clients were no longer pursuing disclosure in respect of spare parts and, in my view, that was a sensible concession.

86. As regards other aspects of Bundled Products, Ryder, of course, has pleaded certain instances, so it does appear that at trial it will contend there is some evidence of collusion. Without the further underlying documents, it may be difficult to assess the extent and the scope of such collusion, which may well be contested. I do consider disclosure from the Commission File of documents relating to collusion on Bundled Products (excluding spare parts) is going to be of some utility.

87. That said, without significant quantitative disclosure which has not been provided, nor sought before me on this Application, it may well be very difficult, if not impossible, to assess the precise impact of the collusion by the cartel on the discounts for Bundled Products. That in itself is not a complete answer to the Application, as rough and ready estimates may be acceptable. It may support Ryder's plea that the presence of collusion means that the Tribunal should be slow to permit such discounts to be applied to reduce the level of the Overcharge. Further, as Daimler pointed out in its submissions, the data already disclosed makes it possible to arrive at the starting price for any given ancillary product purchased by Ryder.

88. I therefore reject the contention that there is no utility in having disclosure in the absence of a quantitative exercise. This disclosure may well be useful and, as I have made clear, the extent and scope of collusion may well be a significant factor for the Tribunal in determining what impact, if any, should be given to the discounts on the Overcharge.

(4) The cost and burden of disclosure

89. The claims in these proceedings are large and the amounts of discounts on Bundled Products are significant. There are 1,426 VT/RT Trucks with a total value of commerce of some £55.7 million. When discounts are taken into account, the VT/RT Defendants have calculated the value of commerce is reduced by some £5.7 million to £50 million. Of that, £4.7 million is in relation to buybacks and £1 million is in relation to the other Bundled Products.

90. There are 3,828 Daimler trucks within the scope of the proceedings with a value of commerce of £130.5 million. Approximately 3,000 include buyback agreements and, out of those, approximately 480 Trucks were subject to specific subsidies which are the discounts for which data is available. Around 30 of the Daimler Trucks sold to Ryder also included service contracts but Daimler is unable to confirm whether there is overlap with the approximately 480 Trucks that included buyback agreements. Approximately 44 Daimler Trucks were sold to Ryder subject to a specific subsidy paid by the 11th Defendant. No extended warranties were sold in respect of the in-Scope Trucks sold to Ryder.

91. The vast majority of the discounts being sought to be applied by Daimler are in relation to buybacks and only a very small proportion in respect of other Bundled Products. But, of course, that is not the end of the matter because the pattern is not so predominant in the case of the VT/RT Defendants and there are still a significant amount of Trucks which may be affected by the Bundled Products Plea outside the buybacks.

92. I do not consider that in the context of the present proceedings, where the sums at stake are large and already large sums have been expended by both sides on disclosure, the cost of the exercise of reviewing the documents sought is likely to be prohibitive. I accept that there will be some cost and burden in reviewing some 4,300 documents but these will already have been identified. I do appreciate that many of the documents will be in languages other than English, including French and German. However, both Daimler and the VT/RT Defendants have well-resourced legal teams. They have lawyers in other jurisdictions involved and they certainly have within their teams people who are

capable of speaking French and German. The work can be divided between them if they wish.

(5) Extent to which the information sought has been provided or is otherwise available

93. A significant amount of information has already been provided by way of the disclosure to date from the Commission File. The disclosure to date has enabled Ryder to plead some collusion in respect of the Bundled Products in their pleadings. However, there is a limit to what it can do because the disclosure it has had has been limited and documents solely relating to the Bundled Products have not been disclosed. It happens that there are documents which relate to the Trucks and to the Bundled Products which have been disclosed which refer to actual and potential collusion in respect of Bundled Products. So it is likely that any further disclosure is going to produce further examples of actual or potential collusion.

94. The picture given to date is likely to be far from complete and it would be unfair on Ryder to face the Bundled Products Plea without knowing the extent to which there has been collusion in relation to the Bundled Products and whether the discounts may have been affected by collusion.

95. Mr Armitage on behalf of Daimler has pointed me to a letter from Travers Smith, dated 29 March 2022, which relates to the position of DAF, and DAF appears to be saying that when they provided their disclosure, both Excluded documents and the Withheld documents, they did not exclude buybacks from the disclosure that they provided.

96. The letter is not as clearly worded as one would hope and there is a great deal of ambiguity in that. I consider that this letter alone should not be a basis for refusing disclosure.

97. Firstly, the disclosure goes significantly wider than just buybacks. Secondly, the Defendants were unable to confirm to me the extent to which the 4,300 documents have material relating to buybacks and it is only once this disclosure exercise has been done that one will know the extent to which there are

documents relating to buybacks in the material sought by Ryder on this Application.

(6) Stage at which the action has reached

98. This Application has been taken out at a relatively late stage. It was taken out in July 2022, albeit Ryder was seeking disclosure prior to that. The factual evidence has been exchanged and the Daimler and VT/RT Defendants will soon be serving their expert evidence. The timetable for trial is set out at paragraph 47 of Frey 7:

> "(a) [**7 October 2022**]**:** expert reports shall be filed and exchanged.
>
> (b) **27-28 October 2022:** a Case Management Conference is listed to take place.
>
> (c) **7 November 2022:** any amended expert reports (taking into account the judgment handed down following the trial in *Royal Mail/BT v DAF*) shall be filed and exchanged.
>
> (d) **9 December 2022:** expert reports in reply shall be filed and exchanged.
>
> (e) **10 January 2023:** without prejudice expert meeting shall have taken place.
>
> (f) **28 January 2023:** joint statements from experts shall be filed.
>
> (g) **17 February 2023:** Claimants' written opening submissions shall be filed and served.
>
> (h) **3 March 2023:** Defendants' written opening submissions shall be filed and served.
>
> (i) **13 March 2023:** start of trial (estimated to last 24 to 26 weeks)."

99. The parties are now focusing on preparing for trial. To require the Defendants to provide disclosure now will, of course, take up resources of the legal teams, but I am satisfied that this relatively focused disclosure will not disrupt the preparation of this case.

100. It is correct that the Daimler and VT/RT Defendants' expert reports are going to be served soon and that they will not be dealing with this issue in the first round, but they will want to respond to whatever Dr Wu says in his evidence, and I will direct that the Daimler and VT/RT Defendants' experts will have

liberty to file expert evidence in reply to that of Dr Wu's expert evidence, which is due to be served in reply in December 2022.

101. In relation to the Defendants' disclosure application which I granted (in part) on 6 July 2022, there was a similar argument of delay, as is now being put before me today. It is said that this is just far too late to seek disclosure now and it is going to disrupt the trial timetable. I rejected that plea in the earlier application for the reasons set out in the July 2022 Disclosure Ruling at [48]-[52]. We are now closer to trial and each application needs individual consideration, so the mere fact that I rejected this argument in July 2022 does not mean I should reject this argument in September 2022. However, I do not consider delay to be a knockout blow to this Application as I do consider that granting the Application will not disrupt trial preparation and the trial date will not be affected.

102. I consider that it was entirely reasonable for Ryder to await the pleadings to be closed on this issue before taking out this application. It was not until February 2022 that the Bundled Products Plea was introduced into the pleadings. Then there was the Re-Re-Amended Reply in reply to that, and it may be said that at that stage it should have applied for disclosure, but it was waiting for further clarification of the VT/RT Bundled Products Plea, which came by letter dated 24 June 2022. Although different parties may have taken a different approach, in my view it was entirely reasonable for Ryder to await that letter before taking out a formal application.

103. It may be said that Ryder knew the extent of Daimler's Bundled Products Plea prior to that and it could have taken out an application a bit earlier. I think it was sensible in the circumstances for them to deal with both Daimler and the VT/RT Defendants at the same time rather than issuing an application against Daimler first and then taking out an application against the VT/RT Defendants once they got the clarification. The reality is, had Ryder made this application earlier, it would have been met with the argument that the application was premature, and certainly that argument would have been successful before me had it been raised prior to the pleadings being closed on the Bundled Products Plea. One of the reasons why disclosure in relation to spare parts was refused

on 11 March 2019 was that it was not yet a pleaded issue even though it was anticipated it may become a pleaded issue.

(7) Impact of earlier disclosure rulings

104. As regards spare parts, disclosure as spare parts was pursued in the VSW proceedings on a separate category as part of the Redfern Schedule process (category P). At the March 2022 CMC in those proceedings, the Tribunal refused to order disclosure in respect of this category. At that stage both the Daimler and the VT/RT Defendants had already amended their pleadings to advance the Bundled Products Plea. As noted above, I do not consider disclosure as to spare parts is necessary and the Tribunal was correct to dismiss that aspect at the previous CMC.

105. Although the parties have referred to an extract from the transcript from the 11 October 2021 CMC, the Tribunal was not dealing with disclosure of documents in relation to discounts in the passages relied upon. I do not consider the Tribunal was determining either way whether or not there should be disclosure of the documents sought in the Application.

(8) Amount of disclosure to date

106. I bear in mind that both sides have already given extensive disclosure at great cost. I do not regard this additional disclosure now sought will involve a disproportionate cost.

107. Standing back, save in respect of spare parts, I consider that it is both necessary and proportionate to order disclosure from the documents within the Commission File as sought in the Application. Of course, that is only in relation to relevant documents. It does not mean all the 4,300 documents have to be disclosed because, of course, some of those documents may relate to ancillary products on which no discount is being sought in the Bundled Products Plea. It should not take long for such disclosure to be provided and Scania and the other addressees of the Decision should have an opportunity to consider whether or not to object to the disclosure of any specific document on privilege or leniency grounds. As Daimler and the VT/RT Defendants are entitled to object on such

grounds as well, it may well be that such review on the part of Scania and other addressees can be quickly carried out because, of course, both Daimler and the VT/RT Defendants will no doubt tell Scania and the other addressees the results of their own review and they would have already excluded certain privileged and leniency documents.

F. CONCLUSION

108. For the reasons given above, the Application, save in respect of spare parts, is granted. The costs of the Application should be in the case as both the Application and the response to it were both made and conducted reasonably.

Hodge Malek KC
Chair of the Competition Appeal Tribunal

Charles Dhanowa O.B.E., K.C. (Hon)
Registrar

20 September 2022